In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1940

No. 1086 107

POPE ESTATE COMPANY (a corporation),
Petitioner,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First Collection District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Subject Index

	Page
Petition for Writ	
I. Summary statement of matter involved	2
Pertinent dates	2
Date of petitioner's title to improvements	3
Trial court's judgment discussed	3
Petitioner's points on respondent's appeal	4
Bruun decision of Supreme Court and its aftermath	5
Court of appeals decision	5
Petition for rehearing in court of appeals	6
II. Reasons relied upon for issuance of writ	7
III. Prayer of petition	9
Brief in Support of Petition	
I. Opinions of courts below	11
II. Jurisdictional averments	12
III. Statement of facts	12
Construction of buildings on petitioner's land	12
Cancellation of the lease	13
The assessment, payment of tax and claim for refund	13
Case tried on stipulation of facts	13
When petitioner received its title to the improvements	14
Points tendered on the appeal of respondent	15
Petitioner's petition for rehearing by court of appeals	16
IV. Specification of errors	16
V. Argument and supporting authorities	17
A. The value of the hotel building which became petitioner's property prior to the advent of the Sixteenth amendment and the Income Tax Act of 1913, cannot be taxed as income under the act	17
(1) Reason supporting the rule	17
(2) The supporting authorities	18
(3) The Revenue Act itself recognizes the limitation	21

Page

(4) Bruun decision offers no conflict..... 22

(5) Modification of decree to take care of point is a simple matter..... 24

B. The value of buildings which became petitioner's property prior to 1933, is not taxable as income for 1933 25

(1) Until upset by this court's reversal of the Bruun decision trial court herein was in agreement with all existing decisions..... 25

(2) Bruun decision in our opinion is not a precedent for court of appeals' reversal of present case 29

(3) Reasoning which we believe supports the trial court's decision in the present case and is entirely consistent with this court's decision in the Bruun case..... 31

Conclusion 33

Table of Authorities Cited

Cases

Blatt v. U. S., 305 U. S. 267 ..... 4, 15, 26, 28, 29, 33, 34

Commissioner v. Center Investment Co., 108 Fed. (2d) 190, 309 U. S. 639 ..... 4, 5, 8, 9, 15, 26, 29, 30, 31, 33, 34

Commissioner v. Wood, 107 Fed. (2d) 869, 309 U. S. 637 ..... 8, 9, 15, 28, 29, 30, 31, 33, 34

Doyle v. Mitchell Bros., 247 U. S. 179 ..... 6, 7, 16, 19, 20, 21, 24, 25

Hays v. Gauley Mt. Coal Co., 247 U. S. 189 ..... 6, 16, 19

Helvering v. Bruun, 105 Fed. (2d) 442, 309 U. S. 461 ..... 5, 8, 16, 22, 23, 25, 27, 29, 30, 31, 34

Hewitt Realty v. Commissioner, 76 Fed. (2d) 880 ... 15, 27, 28, 30

Lewis v. Pope, R. 88-93, 116 Fed. (2d) 328 ..... 5, 9, 11, 12, 16

Lucas v. Alexander, 279 U. S. 573 ..... 16, 20

Lynch v. Turrish, 247 U. S. 221 21

Miller v. Gearin, 258 Fed. 225, 250 U. S. 667 ..... 4, 15, 25, 26, 27, 28, 30

Nicholas v. 15th St. Investment Co., 105 Fed. (2d) 289 27

Southern Pacific v. Lowe, 247 U. S. 330 ..... 16, 19, 20

United States v. Cleveland, 247 U. S. 195 ..... 16, 21

Statutes

Civil Code of California, Sec. 1013 ..... 14, 25

Federal Corporation Excise Tax of 1909—36 Sts. at L. 11, 112 18

Judicial Code, Sec. 240, 28 U. S. C. A. 347 12

Revenue Act of 1913, G(c)—38 Stats. at L. 166 ..... 7, 19, 21

Revenue Act of 1916, 2(c)—39 Stats. at L. 756 ..... 7, 21

Revenue Act of 1932, Sec. 113, 26 U. S. C. A. Internal Revenue Acts, pp. 517-18 ..... 7, 21, 22

Sixteenth Amendment to Federal Constitution 5, 6, 8, 21

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pope Estate Company, respectfully shows that:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This was an action at law tried by the District Court for the Northern District of California, following a waiver of jury trial, wherein petitioner, as plaintiff, sought to recover of respondent herein by way of a tax refund, the sum of $21,820.00, the amount of federal income tax paid by petitioner to respondent, under protest, for the taxable year 1933. (R. 2-8.)

The principal point involved was whether respondent had the right to collect from petitioner for said taxable year of 1933 income tax upon the value of improvements which had been placed upon petitioner's land by his lessee and became its property in prior years, upon the ground that the lease involved was terminated by forfeiture in that year, and that the value of the improvements thereupon and at that moment became income to petitioner. This point is subject to division in that one of the improvements (a hotel building) which carried the bulk of the value taxed as income was erected prior to the advent of the Sixteenth Amendment and, consequently, of the effective date of the Income Tax Act and therefore, according to petitioner's contention, its value was free from the toils of the Act.

The facts were presented to the trial court in the form of a written stipulation of the parties hereto. (R. 61-66.)

Pertinent Dates.

The selection of the following dates from the stipulation will simplify the statement of facts:

1909, March 18: The lease was entered into. Its term was 50 years. (R. 9 and 10.)

1912: The Terminal Hotel was built by the lessee; its economic value in 1933, pursuant to stipulation, being $124,635.65. (R. 65.)

1913, February 25: Income tax amendment (the Sixteenth) was added to the Constitution of the United States.

1913, October 3: Congress passed first act under the power of the Amendment, taxing incomes retroactively to March 1, 1913. (38 Sts. at Large 114.)

1915: The lessee completed the final improvement on the premises—a garage building, stipulated to have a 1933 economic value of $15,432.15. (R. 65.)

1933: The lease was terminated by forfeiture for nonpayment of rent. (R. 4, 61.)

Date of Petitioner's Title.

Under California law as applied to the terms of the lease in question, the hotel became petitioner's property in *1912,* and the garage building in 1915. (Opinion of Circuit Court of Appeals, R. 88. See brief filed in support hereof, p. 14 herein.)

Trial Court Judgment.

The trial court rendered judgment for petitioner directing refund to it of the tax paid in the sum of $21,276.49, together with interest. (R. 77.) It found that the tax to be refunded included that assessed against the value of the hotel building of $124,635.65

and that against the value of the garage of $15,432.50. (R. 70, 73, 75.)

The trial court judgment in so far as the point here involved is concerned was based upon its conclusion that petitioner lessor realized no income in 1933 by the fact that, by termination of the lease through rental default, it recovered possession of the improved premises, in that year. (R. 75.) Without doubt the trial judge was influenced somewhat to that end by the decision of the Circuit Court of Appeals of this Circuit (the Ninth) in *Miller v. Gearin,* 258 Fed. 225, which then stood unimpeached, and this court's decision in *Blatt v. United States,* 305 U. S. 267.

The Appeal.

The government (respondent herein) appealed from the judgment to the Circuit Court of Appeals for the Ninth Circuit. While the appeal was pending before one division of that court, another division thereof decided the case of *Commissioner v. Center Investment Co.,* 108 F. (2d) 190, and there held under the authority of *Miller v. Gearin* (*supra*) and the *Blatt* case (*supra*), that where the title to the improvements passed to the lessor before the taxable year, there was no income to lessor in the taxable year, through the mere fact that the lease was terminated therein.

Petitioner's Points on Appeal.

Petitioner raised two points in its brief in answer to respondent's appeal: (1) that under the authority of the above cited cases and a number of similarly decided precedents, neither the value of the hotel nor of the garage building represented income in the year the

lease was terminated, and (2) the income tax law could not in any event tax, as income, the value of improvements which became petitioner's property *prior to the advent of the Sixteenth Amendment and the income tax law.*

The Bruun Decision and Its Aftermath.

Before the appeal could be determined, this court rendered its opinion in *Helvering v. Bruun,* 309 U. S. 461, holding that where the lessor acquired title to and recovered (by forfeiture of the lease) possession of improvements placed on his land by his lessee, in the taxable year, the value thereof was income and taxable for that year. By virtue of the fact that acquisition of title and recovery of possession were simultaneous in the *Bruun* case, this court did not there decide *whether* the year of acquisition of title OR the year of the surrender of the lease (where they take place in different years) determines the year of income. Therefore, had the matter rested with the *Bruun* decision, the judgment of petitioner here might have been undisturbed on the appeal. (See opinion of Circuit Court of Appeals, R. 92.) But this court's granting of certiorari and, without a hearing, reversing: (1) the decision of the Circuit Court of Appeals of this Circuit, in *Commissioner v. Center Investment Company,* 309 U. S. 639, and (2) of the court of the Seventh Circuit, in *Commissioner v. Wood,* 309 U. S. 637, turned the tide against petitioner.

Court of Appeals Decision.

On *December 17, 1940,* the Circuit Court of Appeals reversed the judgment, and in its opinion held that the

value of both the hotel and the garage was taxable to petitioner in the year in which the lease was terminated, namely, 1933. (R. 88, 93; 116 F. (2d) 328.) It will be observed that no reference is made in that opinion to the point raised by petitioner that, the hotel having been added to and become petitioner's property prior to the Sixteenth Amendment and the taxing act, its value as income was beyond the grasp of the Act; although petitioner herein cited in its brief on appeal the decisions of this court in *Doyle v. Mitchell Bros.*, 247 U. S. 179, and *Hays v. Gauley Mt. Coal Co.*, 247 U. S. 189, which directly support petitioner's contention and have never been reversed or modified.

Petition for Rehearing.

On *January 15, 1941,* petitioner filed with the Circuit Court of Appeals, its petition for rehearing, wherein it reiterated its point that under the unmodified decisions in *Doyle v. Mitchell* (*supra*) and *Hays v. Gauley Mt. Coal Co.* (*supra*), its judgment should stand as to the refunding of the tax assessed against the value of the hotel building, to-wit: in the amount of $18,867.36, plus interest.

In the said petition for rehearing, petitioner said:

> "However, approximately ninety per cent of the tax which the District Court ordered refunded to appellee, represents tax upon an improvement to appellee's real estate made *prior to the Sixteenth Amendment,* authorizing Congress to tax incomes without apportionment among the states, an improvement which was the property of appellee at the very time, and prior to, both the adoption of the Sixteenth Amendment and the effective date of the Income Tax Act.

> We believe that as to that portion of the tax, this court should be as definitely and completely controlled by the Supreme Court decisions in *Doyle v. Mitchell Bros.* (247 U. S. 179) and the other cases hereinafter cited, as it was controlled by the *Bruun* case in determining the date of the taxpayer's *'realization'* of income."
>
> (p. 2 of Petition for Rehearing.)

The petitioner went further and called the court's attention to the fact that Congress itself has consistently so interpreted the Act, by expressly limiting the tax to income "accruing" since the effective date of the Act—March 1, 1913.

> Act of 1913—G(c): 38 St. at Large p. 166;
>
> Act of 1916—2(c): 39 St. at Large p. 756;
>
> Act of 1932—Sec. 113(a), 13 and (b)1: 26 U. S. C. A. "Internal Revenue Acts", pages 517-518.

On March 7, 1941, petitioner's petition for a rehearing of the appeal was denied by the Circuit Court of Appeals, without opinion. (R. 94.)

II.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

(1) The decision and opinion of the Circuit Court of Appeals in so far as it denies to petitioner a refund of the tax assessed against the value of the hotel building, erected prior to the Sixteenth Amendment, is in direct conflict with the rule laid down by this court in *Doyle v. Mitchell* (*supra*) and *Hays v. Gauley Mt.*

Coal Company (*supra*), in that it gives a stamp of approval to the taxing of an enhancement of value which antedated the Sixteenth Amendment to the Federal Constitution and accrued before the Income Tax Law went into effect.

(2) The decision misapplies the opinion of this court in *Helvering v. Bruun* (*supra*), and the court's reversal of *Commissioner v. Center Investment Company* (*supra*) and of *Commissioner v. Wood* (*supra*), by failure to recognize the fact that the decisions in those cases had nothing to do with the taxing of values which accrued *prior to the adoption of the Sixteenth Amendment.*

(3) The decision, in interpreting the Income Tax Act ignores the construction placed thereto by Congress itself, as shown hereinabove.

(4) An important question of Federal law is involved which lacks direct precedent and requires this court's determination and amplification, namely: how the rule in *Helvering v. Bruun,* 309 U. S. 461—that the value of improvements placed on leased premises by the lessee is taxable as income to lessor in *the year* in which the lessor *simultaneously* acquired the title thereto and possession thereof, on forfeiture of the lease—is to be applied to a case where the acquisition of title by the lessor took place in one taxable year and the recovery of possession of the premises in another taxable year (as in the case at bar). Upon this point no opinion has been rendered by this court, except the minute orders granting certiorari and without a hearing reversing the Court of Appeals' decisions

in *Commissioner v. Center Investment Company,* 108 Fed. (2d) 190, and *Commissioner v. Wood,* 107 Fed. (2d) 869.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals, had in the case numbered and entitled on its docket, No. 9534, *John V. Lewis, former Collector of Internal Revenue for the First Collection District of California, Appellant v. Pope Estate Company, a corporation, Appellee,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this court and for such further relief as to this court may seem proper.

Dated, San Francisco, California,
May 19, 1941.

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